Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2022

DOROTHY S. BUCHER, HERBERT KLION, as Trustee of Klion Employees' Pension Fund and ABRAHAM WECHSLER, as Personal Representative of Plaintiff Bertha Wechsler, deceased,

Petitioners,

against

FORREST N. SHUMWAY, WILLIAM E. WALKUP, CHARLES S. ARLEDGE, BREWSTER L. ARMS, NICOLA L. CAIOLA, ANDREW J. CHITIEA, GEORGE MELAMID, ARCH MONSON, JR., ROBERT O. REYNOLDS, CLINTON R. STEVENSON, HARRY H. WETZEL, HAROLD M. WILLIAMS, JOHN O. LOGAN, HENRY J. NAVE, THE SIGNAL COMPANIES, INC., ROY T. ABBOTT, JR., CHARLES G. BLUHDORN, O.C. CARMICHAEL, JR., MARTIN S. DAVIS, JOHN N. DUNCAN, LYLE FIFE, DON F. GASTON, DAVID N. JUDELSON, JUDD LEIGHTON, FRANCIS S. LEVIEN, DAN W. MADDOX, T.H. NEYLAND, CHESTER H. ROTH, IRWIN SCHLOSS, SAMUEL J. SILBERMAN, GEORGE A. SMATHERS, HAROLD U. ZERBE and GULF & WESTERN INDUSTRIES, INC.,

Respondents.

PETITIONERS' REPLY MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners Dorothy S. Bucher, Herbert Klion and Abraham Wechsler submit this brief in reply to the joint brief of respondents in opposition to their petition for a writ of certiorari.

I

THE ANTITRUST CLAIM

Respondents' brief in opposition misdescribes the complaint and misdescribes the antitrust issue in arguing that:

> "Petitioners seek to convert what is at most a garden variety state law breach of fiduciary duty claim into a Sherman Act treble damage claim simply by attaching a *per se* price-fixing label to respondents' alleged agreement to offer the same price for a portion of Signal's common stock." (p. 9)

The heart of the complaint is that Signal and Gulf & Western each wanted to buy *for itself* many millions of dollars worth of Signal stock; that they were poised to compete with each other by rival tender offers; and that they agreed not to compete with each other.

The complaint alleges that defendants avoided competition between them by agreeing that each would offer the same price as the other, and that they would split up the stock which could be purchased by an allocation arrangement bargained out between them. This agreement had the purpose and effect of avoiding a tender offer bidding contest between them which they recognized would result in successively higher bids to the advantage of the public holders of Signal stock but to the detriment of themselves as rival bidders. It was precisely this kind of agreement between would-be buyers that this Court branded as violative of the antitrust laws in *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911). In *American Tobacco,* a leading case whose principles have been consistently reaffirmed in subsequent decisions of this Court, the tobacco companies sought to avoid competition between them in buying tobacco leaf by buying jointly at non-competitive price and allocating between them the tobacco which could be bought.

The salient economic fact on which the complaint is based is that competition between would be buyers of blocks of stock is now as real and as important as competition between would-be buyers of tobacco leaf. Until 15 or 20 years ago, major corporations were restrained by an unwritten Gentlemen's Code from making tender offers designed to wrest control of other major corporations away from their management. As this inhibition vanished, the "unfriendly" tender offer came into prominence, and shortly thereafter the competitive tender offer. In the last 15 years competitive tender offers have come to be an important feature of the financial world, and at times the bidding wars have been so dramatic that news of them has dominated the financial press. It is only within this framework of recent financial developments that the allegations of the complaint can be properly understood. With all respect, we submit that Judge Tenney was grossly misinformed in holding that there is no competition between would-be buyers of stock, and that defendants' brief in opposition seeks to perpetuate the same gross economic fallacy in arguing that the agreement between defendants did not restrain competition.

Stated most simply, the complaint alleges that defendants avoided a bidding war between them, to be carried out by rival tender offers, by agreeing to bid at the same artificially low price and to divide up the stock which they could purchase. We suggest these facts constitute a classical restraint of trade and not merely a scheme to "rig the price of a particular stock" in violation of the securities law or merely a "state law breach of fiduciary duty".

Despite defendants' effort to create confusion, the actual issue to be determined on review is the one set forth in our petition: Does the scope of the antitrust laws extend to an agreement between rival tender offerors not to compete with each other, but instead to each bid at a price fixed between them and to share the stock so purchased? When

this issue is properly identified it will be seen that defendants subsidiary arguments are devoid of merit.

1. *Business Competition.* There is no basis in precedent or reason for defendants' argument that the antitrust laws do not apply to competition in the purchase of stock because this is not "business competition" (Respondents' brief, page 12). This argument represents a tortured effort to escape the decision of *United States* v. *National Association of Securities Dealers,* 422 U.S. 694 (1975), which expressly recognized that an agreement to fix resale prices for securities would violate the antitrust laws unless the particular practice in question was sanctioned by the Investment Company Act. Nothing in that decision supports defendants proffered distinction.

Certainly, in seeking to buy large blocks of Signal stock defendants were engaged in a business activity sanctioned by their respective corporate charters. Buying and selling businesses and interests in businesses is now an important activity of many major American corporations. This field of activity possesses no immunity from the pervasive scope of the antitrust laws. Indeed it is notorious that defendant Gulf & Western has been engaged in an ongoing practice of buying stock interests in other companies. See *Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co., Inc.,* 476 F.2d 687, 696-7 (2d Cir. 1973):

> "G&W has a well established practice of eventually acquiring firms in which it initially purchased only a small percentage of the outstanding shares."

Even if the anticompetitive conspiracy of defendants were to be regarded as a "one-shot" transaction, its magnitude alone gives it the requisite commercial significance for regulation under the antitrust laws. Defendants sought to purchase more than $120,000,000 worth of stock pursuant to their conspiracy. That the conspiracy could have been concluded in the space of several months does not make it

less important to the national economy than conspiracies involving far smaller amounts which are carried out over the course of many years.

2. *Goods and Services.* There is no merit to defendants' arguments that their conspiracy is outside of the scope of the Sherman Act because it does not involve competition in the purchase or sale of goods or services. It is true that in *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 493 (1940) this Court, in a dictum, issued some language indicating that the antitrust laws were restricted to goods and services. However, a few years after the *Apex Hosiery* decision, this Court held that insurance contracts (obviously neither "goods" nor "services") were within the ambit of the Sherman Act, and expressly rejected the argument that the act was limited to "goods and services": *United States* v. *South-Eastern Underwriters' Assn.,* 322 U.S. 533, 554, n. 40 (1944).

In addition to insurance policies, the antitrust laws have been held applicable to restraints of trade with regard to the following items, none of which can be classified as either "goods or services": trading stamps—*Eastex Aviation* v. *Sperry & Hutchison Co.,* 522 F.2d 1299 (5th Cir. 1975); newspaper advertising—*Times Picayune Publishing Co.* v. *United States,* 345 U.S. 594 (1953); performing rights to music—*Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.,* 441 U.S. 1 (1979); rights to exhibit motion pictures—*United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131 (1948).

Nothing in the language of the Sherman Act restricts its coverage to dealings in "goods and services"; the words of the act condemn restraint of trade generally. Indeed, in *United States* v. *National Association of Securities Dealers,* 422 U.S. 694 (1975) and *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975) this Court recognized that apart from the impact of subsequent legislation, buyers or sellers of securities would have a valid claim

under the antitrust laws for a conspiracy to fix the prices of securities.

3. *The Impact of the Williams Act.* There is no merit to defendants argument that the Williams Act grants them immunity with regard to the conspiracy alleged in the complaint to restrain competition. Section 14(d)(2), 15 U.S.C. § 78n(d)(2) (1971), provides:

> "When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "'person" for purposes of this subsection."

However, defendants in this case were not a partnership, limited partnership, syndicate or other group. Each defendant purchased its shares separately and held them separately. There was no agreement or understanding that they would sell them together or pool profits or losses. Indeed, defendants went out of their way to emphasize that they were making separate offers. There was no commonality of purpose in the purchases made by defendants except their unlawful agreement not to compete with each other.

The Williams Act recognizes that a legitimate partnership or joint venture may act to acquire a common block of stock and that all members thereof must offer the same price. However, it is well settled that the antitrust laws may not be evaded merely by labeling the conspirators as partners, joint venturers or the like: *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 597-598 (1951).

In any event, it is apparent that defendants claim that they are a legitimate group protected by the provisions of the Williams Act raises a defense dependent upon issues of fact which are outside the purview of the complaint. These defensive issues could not properly be considered

in connection with the adequacy of the complaint nor were these defensive contentions supported by affidavits or any other factual showing. Indeed, the complaint was dismissed before plaintiffs even had an opportunity to explore such defensive material by way of discovery.

II

THE SECURITIES LAW CLAIM. RESPONDENTS' JOINT BRIEF IN OPPOSITION MISSTATES THE RECORD IN VITAL PARTICULARS.

In our petition for a writ of certiorari we pointed out that Judge Lowe (1) interpreted the complaint restrictively, (2) ignored arguments and facts which we had told her we wished to include in an amended complaint, and (3) erroneously stated that she had afforded us an opportunity to amend the complaint which proved futile. Respondents' brief in opposition inaccurately states (p. 19) that Judge Lowe's opinion did not ignore the new material, but ". . . specifically considered these arguments and found them insufficient . . ."

A reading of Judge Lowe's opinion will show that this claim made by Respondents is flatly inaccurate.

1. Judge Lowe's opinion makes no mention whatsoever of the press release of April 12, 1976 which failed to disclose the control agreement between Signal and Gulf & Western. This press release caused plaintiff Klion to sell his stock. We informed Judge Lowe expressly that we wished to amend the complaint to make specific reference to the press release, and Judge Lowe denied such permission (Petition for Certiorari, p. 15 and n. 11).

2. The complaint does not specifically refer to Rule 14d-1, but in our arguments and briefs to Judge Lowe we emphasized the impact of this Rule, which requires disclosure of the purpose of the tender offer. We also pointed

out that defendants purported to comply with this Rule by stating certain alleged purposes which were not the true purpose.

Judge Lowe's opinion ignored the existence of Rule 14d-1. Apparently adhering to the bare bones of the complaint, Judge Lowe's opinion merely stated that tender offerors are not required to state their subjective purposes in making the offer. Judge Lowe's opinion relied on prior cases to which Rule 14d-1 did not apply, and in which no false statement of purpose had been made by defendants.

Remarkably, Judge Lowe's opinion failed to mention the fact, stressed by us in argument, but not stated in the complaint, that the tender offer statement lied in claiming that Signal's purpose in buying the stock was to invest its "excess funds". In fact, there were no excess funds, and Signal would have had to borrow $32,000,000 in order to pay for the shares it sought to buy. (Petition for Certiorari, p. 14).

3. Judge Lowe's opinion mischaracterized the complaint's allegation of concealment of the *fact* that Gulf & Western was willing to pay a higher price than $20.00 per share for Signal stock. The complaint alleges (App. D, 43a) failure to disclose "That Gulf & Western would have offered a higher price per share if not required to vote for Signal's incumbent directors and to support Signal Management, and to agree not to seek control of Signal." As we made clear in our briefs and arguments to Judge Lowe, it is the theory of the complaint that in the negotiations between Signal's management and Gulf & Western, Gulf & Western expressly stated or otherwise made it clear that it was willing to offer more than $20.00 per share for stock not burdened by restrictions against seeking control. Such a manifestation of willingness to pay a higher price for untrammeled stock is, we believe, a hard fact which defendants were obligated to disclose in their tender offer

statement. Judge Lowe denied us the opportunity to amend the complaint to make our position crystal clear in this respect. She then followed up by interpreting the complaint in a restrictive and artificial way as merely alleging a failure to disclose ". . . what Gulf & Western would have done under other circumstances." (App. C, 31a).

The upshot of Judge Lowe's practice was that she interpreted the original complaint in an unfavorable manner; denied any discovery of facts entirely within the control of defendants; refused to allow amendment of the complaint to cure the matters she found cause for dismissal; and thus denied plaintiffs any opportunity for substantial justice.

We respectfully submit that an examination of Judge Lowe's opinion will reveal that respondents are in factual error when they state that the opinion considers all of the facts and arguments which would have been applicable had we been allowed to amend the complaint.

The simple fact is that Judge Lowe engaged in an extreme departure from the proper course of practice to be followed in connection with motions addressed to the sufficiency of a complaint. Unfortunately, the Court of Appeals was not sufficiently attentive to grasp these facts, and thus countenanced a departure from norms designed to promote the interests of justice and to guarantee ". . . that bona fide complaints be carried to adjudication on the merits." *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 376 (1966), cited in our petition. We are not unmindful of the great pressure of case load on the Court of Appeals for the Second Circuit, and of that Court's pride in keeping its calendars up to date, but in the instant case, prompt decision was achieved at the expense of careful and informed consideration of the appeal before it.

CONCLUSION

For the reasons stated hereinabove and in the petition, petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

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